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## Issues in the Third Circuit: Introduction

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## Introduction

THE HONORABLE D. MICHAEL FISHER\*

I have been asked to write the Introduction for this year's Third Circuit Review in the *Villanova Law Review*. This request presents a rather unique opportunity to address various critiques of the law in the Circuit in which I serve. As tempting as this may be, I will forego that invitation in order to present several non-doctrinal aspects of appellate judging that are not fully reflected in the opinions that the authors of the enclosed Casebriefs so ably discuss. In so doing, I hope to persuade the reader that the task of judging on an appellate court is not accomplished solely by resolving doctrinal inconsistencies. After all, reasonable minds often differ when presented with such questions. Rather, I would like to emphasize three aspects of appellate judging that, in my view, play an important role in guiding our decisions: first, the need to balance stability and predictability in the law with adaptation to societal change; second, the role of civility and reasoned discourse amongst judges on our Court; and third, the role of good advocacy in informing the development of the law in our Circuit.

An appellate court is tasked with the job of ensuring that the law remains relevant. This is a demanding responsibility. My job would be fairly easy if it simply required the application of pre-ordained legal rules to materially indistinguishable facts, but that is rarely how it works. As Justice Oliver Wendell Holmes famously put it, "[t]he life of the law has not been logic, but experience."<sup>1</sup> In other words, the rationality of law is judged by "[t]he felt necessities of the time."<sup>2</sup> As I understand Justice Holmes's observation, the rule of law is premised on past experience, such as our common law, and predictions of future experience, such as legislation, because society follows paths that no logic can hope to explain. Consequently, as our experience changes, it is inevitable that the law does as well. Law that bears no relation to the world we live in would lack any semblance of rationality. Good law therefore requires validation through

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\* United States Court of Appeals for the Third Circuit.

1. OLIVER WENDELL HOLMES, *THE COMMON LAW* 1 (1909).

2. *Id.*

comparisons with actual experience, and it is a judge's responsibility to attend to this validation when a case so requires.

In this way, Justice Holmes's adage has been borne out by *my* experience: as appellate judges, we are routinely faced with rectifying the divergence of law—which is only amenable to change through proper legal channels—and the world around us—which is constantly in flux. Recent economic events, for example, have prompted serious criticisms of the efficient market hypothesis: Do rational market participants or irrational herd behaviors determine market outcomes? If market bubbles exist, how can we be certain that stock prices reflect all available information, and should we revise our standard for 10-b-5 materiality? Technological progress raises similar concerns. How do school administrators grapple with the free speech implications of their students' use of social media? Does the Fourth Amendment require law enforcement to obtain a warrant before tracking a criminal suspect's movements with a GPS device? These are questions that pull at the contours of our law. And if the life of the law is experience, then such contours cannot be immune to change.

Still, we must not be over-eager. If experience on the bench has taught me anything, it is that judges must be careful about extending a rule of law beyond the case before them. After all, experience may well dispose of our predictions about the future no matter how sound they appear in the rationality of the present, and “the nature of litigation and concerns about *stare decisis* . . . make it difficult for judges to change course if predictions prove inaccurate.”<sup>3</sup> Judges alone lack the institutional competence to gather empirical data, let alone make empirically based predictions. We operate on a case-by-case basis. Legislatures, by comparison, have an institutional advantage in “amass[ing] the stuff of actual experience and cull[ing] conclusions from it.”<sup>4</sup> And the lives of our predecessors and contemporaries, as laid out in writings like constitutions or legal opinions, offer similar insight into the substance of our past. Justice Holmes may have found it “revolting to have no better reason for a rule of law” than to say “so it was laid down in the time of Henry IV,”<sup>5</sup> but the wisdom of our collective experience should not be lightly discarded.

There are, moreover, important values served by methodical changes in the law, rather than eagerly adopting whatever theory of human nature wins the day. In Lon Fuller's “Eight Ways to Fail to Make Law,” in which he presents the allegory of a fictional King Rex, Fuller describes a kingdom where the legal code is subject to a “daily stream” of amendments to keep pace with societal change. As one might expect, this leaves the citizens unsure of the law at any given moment, and without any ability to predict where it might head next. Adherence to such law is hopeless;

3. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3128 (2010) (Breyer, J., dissenting).

4. *United States v. Gainey*, 380 U.S. 63, 67 (1965).

5. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

chaos ensues. Thus, Fuller suggests, “law that changes every day is worse than no law at all.” Even without taking his cautionary tale literally, it offers an important lesson: law is defined in part by its predictability and stability. As judges, we must be mindful of this truth. A law on which no one can rely fails to serve its central purpose.

What I find intriguing in this issue of the *Villanova Law Review* is its focus on *outcomes*. That is, the case comments presented here provide insight into the substance of our opinions, but, through no fault of the authors or editors, can offer very little about how we got there. This is not a flaw, but rather a simple reality: the decision-making *process* of an appellate court is not entirely reflected in the text of an opinion, though the ultimate decision is. In light of this limitation, I would like to turn the focus of my discussion from substance to process.

Critically, the work of an appellate court is that of a collective body. This is an important parameter of our job. We issue decisions as a *court*, not (except for the occasional dissent or concurrence) as individual judges. Because our decision-making requires a meeting of the minds amongst a panel, our decisions are inevitably guided by civility, collegiality, and reasoned discourse, all in the name of reaching a decision that is both just and justified. Numerous theories abound regarding the politics of judges in the courts of appeals, but I would posit that our ability to work together carries far more weight in our decisions than most commentators recognize. And I believe that it plays an equally important role in preserving the public’s respect for the judiciary, and, in turn, the rule of law, which are the most important parameters by which *we* are judged.

I am not alone in this conviction. As Judge Harry Edwards of the D.C. Circuit has observed, “judges have a common interest, as members of the judiciary, in getting the law right, and . . . as a result, we are willing to listen, persuade, and be persuaded, all in an atmosphere of civility and respect.”<sup>6</sup> We are judges: our job is to disagree, and in fact, our oath of office obligates us to. But good law is the product of constructive disagreement, not blind opposition. After all, “[i]t is the duty of a judge to read, to inquire, to touch, to learn, so that his or her own mind remains open to an honest plea from all sides in a dispute, including from his or her own colleagues.”<sup>7</sup> It is no coincidence that many of our nation’s most highly respected jurists have been those for whom civility and collegiality played an essential aspect of their job. *Brown v. Board of Education*, for example, is extolled almost as much for being unanimous as for its groundbreaking decision, and the force of the Court’s judgment in that case derives in no small part from the fact that it was undivided. Chief Justice Earl Warren is widely regarded for having brought about such unanimity. Justice William

6. *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639, 1654 (2003).

7. Anthony M. Kennedy, *Judicial Ethics and the Rule of Law*, 40 ST. LOUIS U. L.J. 1067, 1071 (1996).

J. Brennan, it is said, “never manifested any element of acrimony in either his written opinions or his spoken word.”<sup>8</sup>

With all of the attention focused on case outcomes, it is not unusual to overlook these important qualities. This was highlighted by an exchange at our recent Third Circuit Review for the Allegheny County Bar Association, where a panel of Third Circuit judges, including myself, had the opportunity to respond to questions about important decisions that our court had issued over the course of the year. Our court had recently published two *en banc* decisions addressing school speech in the context of online social media. In the more heavily contested of the two, *J.S. v. Blue Mountain School District*,<sup>9</sup> eight of my colleagues joined a majority opinion, five joined a concurrence, and six of my colleagues joined a dissent, which I authored. From an outsider’s perspective, our court appeared “sharply divided,” and a member of the audience queried how we dealt with such divisions. Even where an opinion can be said to be “sharply divided,” I explained, it is the opinion that is divided, not our Court. Our Court enjoys a firmly entrenched culture of civility and collegiality. Particularly in a case such as *J.S.*, where the views expressed on all sides are well-founded and passionate, this culture allows us to address issues that are both inflammatory and mundane in a thoughtful and reasoned manner. This culture also ensures that, even when our opinions are divided, our Court retains its ability to disagree while maintaining the relationships that allow us to engage, together, in the task of appellate judging.

This culture is reinforced through our Circuit’s internal operating procedures and rules governing the drafting and publication of opinions. Before an opinion is published, it circulates amongst the panel during the drafting phase. Panel members regularly go back and forth on substantive issues. Occasionally, a dissent or concurrence will be written, which also circulates with the members of the panel majority for comments or suggestions. An opinion may therefore be said to represent not just the view of the authoring judge, but also the views of the panel as a whole. Once an opinion clears the panel, it circulates to the full court. For a period of eight days, any judge may offer comments or suggestions to the author, or raise concerns to the full court. And in instances where a circulating opinion would benefit from rehearing *en banc*, either because it represents a change of course from past precedent, or because it raises a particularly unique or important point of law, a majority of active judges may vote to rehear the case. Thus, every precedential decision handed down by the Third Circuit—*en banc* or otherwise—represents not just the considered judgment of the author, but also of the panel and our entire Court.

Not only are the judges on the Third Circuit colleagues on the bench, but outside of the chambers as well. Whether we are sitting on a panel

8. Edward R. Leahy, *Justice William J. Brennan, Jr.: The Law of Free Expression and the Art of Civility*, 6 COMM.LAW CONSP. 1, 5 (1998).

9. 650 F.3d 915 (3d Cir. 2011) (*en banc*).

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together and making time for lunch, convening with our clerks for a baseball game, or writing a brief email congratulating a colleague for an accomplishment, our out-of-court interactions greatly enhance our working relationships. I have found that, when faced with the numerous difficulties inherent in judging, the collegiality we develop off the job allows us to maintain civility even when we vehemently disagree. It is what allows us to issue a “sharply divided” *en banc* opinion, but retain the essence of what it means to be a court.

I am constantly reminded of our good fortune in this respect by the less civil tone that one hears in political discourse and the media these days. Having served in all three branches of government, I have witnessed first-hand the debilitating effects of incivility. A loss of collegiality and a reluctance to engage with those who disagree with a position present just as serious obstacles to decision-making by judges. As Justice Kennedy has observed, “[t]he collegiality of the judiciary can be destroyed if we adapt the habits and mannerisms of modern, fractious discourse.”<sup>10</sup> Civility, collegiality and reasoned discourse are the essential ingredients that enable the judges on the Third Circuit to fulfill our duties. We strive to maintain this culture, for we believe that it is of central importance to our work, and I cannot imagine it being any other way.

If judging on the Court of Appeals is indeed a common endeavor, as I believe it is, then such an endeavor also relies on good advocacy. Federal courts are, for good reasons, constrained by Article III’s case and controversy requirement and can only resolve the cases presented to them. As such, the advocate’s role in shaping the posture of the cases and the issues presented to a court critically influence the court’s decision, and over time, these strands of opinions form the fabric of our common law system. Thus, we cannot discount the essential role advocates have played throughout history in shaping the law, not only of our Circuit, but of our nation.

Justice Robert Jackson described the essential role of the appellate lawyer in our legal system:

Adequately and helpfully to present a case—as it is about to be transformed into a precedent to guide future courts, to settle the fate of the unknown litigants, perhaps to become required reading for a rising generation of lawyers—will challenge and inspire the true advocate. Decisional law is a distinctive feature of our common-law system, a system which can exist only where men are free, lawyers are courageous and judges are independent. To participate as advocate in supplying the basis for decisional law-making calls for the vision of a prophet, as well as a profound appreciation of the continuity between the law of today and that of the past. [The advocate] will be sharing the task of reworking

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10. Kennedy, *supra* note 8, at 1072.

decisional law by which every generation seeks to preserve its essential character and at the same time to adapt it to contemporary needs. At such a moment the lawyer's case ceases to be an episode in the affairs of a client and becomes a stone in the edifice of the law.<sup>11</sup>

Our adversarial system of justice fundamentally relies on the competence and unavailing efforts of our litigators to represent their clients' interests. But I dare to hope, as Justice Jackson did, that the advocates before our courts will shoulder an even greater responsibility that comes with the distinct privilege of practicing before us. As the present issue of the Third Circuit Review reveals, there is much room for advocates to pursue their endeavors with a vision beyond the case law that is already established. This is especially true in areas of the law that are heavily influenced by recent scientific, technological, and economic developments. In such cases, my colleagues and I often rely on the advocates' diligence to identify gaps in the law and to present arguments for why and how they should be filled.

These gaps in our jurisprudence do not exist because, as many commonly assume, courts want to avoid addressing difficult and controversial legal issues. Rather, my colleagues and I shoulder the weight of this duty every day with sobriety and pride. When novel issues of law arise, we generally rule on the specific issue presented without venturing into related but ultimately ancillary areas of the law. Often, this is because a particular case did not present the best circumstance to tackle those issues, and thus did not have the benefit of the vigorous advocacy necessary to inform our decision on matters of far-reaching implications. These limitations highlight where the role of the advocate is essential: when faced with cases that do present genuine issues requiring resolution, advocates are in the best position to argue how the gaps in the law should be filled, keeping in mind our respect for *stare decisis* as well as the necessity of keeping pace with modern developments. Where the advocate fails to do so with vigor and vision is a lost opportunity for not only the client but also future litigants and our society.

Though this may be no easy task, Justice Jackson's recount of an old parable aptly demonstrates my hope for our advocates.

Once upon a time three stone masons were asked, one after the other, what they were doing. The first, without looking up, answered "Earning my living." The second replied, "I am shaping this stone to pattern." The third lifted his eyes and said, "I am building a Cathedral." So it is with the men and women of the law that labor before the Court. The attitude and preparation of some show that they have no conception of their effort higher

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11. Robert H. Jackson, *Advocacy Before the United States Supreme Court*, 37 CORNELL L.Q. 1, 16 (1951).

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than to make a living. Others are dutiful but uninspired in trying to shape their little cases to a winning pattern. But it lifts up the heart of a judge when an advocate stands at the bar who knows that he is building a Cathedral.<sup>12</sup>

Like Justice Jackson, I continually look forward to the presence of a lawyer who helps us to shoulder the responsibilities we share together.

I hope that my brief foray into these important yet oft-overlooked aspects of appellate judging has proved useful. And just as my thoughts have been informed by the views and experiences of my colleagues and members of the bar, I look forward to engaging in my work with the insight of those who may some day present a case before the Third Circuit. With the courage and vision of our advocates, combined with the reasoned and civil discourse among my colleagues, I am confident we will continue to engage in our common endeavor in building the edifice of law.

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12. *Id.*



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